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JUDGE'S COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GREGARIO A. VARGAS,

Plaintiff,

v.

C.O. POWELL, et al.,

Defendants.

CIVIL ACTION

NO. 1:CV-01-0296

(Judge Caldwell)

FILED
HARRISBURG
SEP 07 2001

~~MARY E. D'ANDREA, CLERK
Per
DEPUTY CLERK~~

**DEFENDANTS' C.O. POWELL, C.O. BIGELOW AND SGT. EWING'S
MOTION TO DISMISS FOR FAILURE TO EXHAUST
ADMINISTRATIVE REMEDIES PURSUANT TO 42 U.S.C. §1983 AND
FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE
GRANTED**

AND NOW, come Defendants Corrections Officer Powell, Corrections Officer Bigelow and Sergeant Ewing, by and through their attorney, Michael J. McGovern, and move your Court to dismiss Plaintiff's Complaint and in support thereof aver as follows:

1. Plaintiff Gregorio A. Vargas (hereinafter "Vargas") alleges in his Complaint that on two separate occasions he swallowed metal objects which were in his food. These incidents occurred on October 2, 2000 and October 17, 2000.

2. On both occasions, Vargas was taken to the institution's medical facilities where he received treatment.
3. Vargas has styled his Complaint as a violation of his Eighth Amendment rights to be free from cruel and unusual punishments.

**FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES
PURSUANT TO 42 U.S.C. §1997(e)(a)**

4. Vargas admits in his Complaint that there is a prisoner grievance procedure in place at the institution where he is incarcerated, and further alleges that he filed a grievance regarding the events which give rise to this Complaint.
5. Vargas does not allege that he exhausted the grievance procedure in accordance with 42 U.S.C. §1997(e)(a).
6. Vargas has not presented any evidence that he has exhausted the grievance procedure in accordance with 42 U.S.C. §1997(e)(a).
7. The copy of the grievance which Vargas has provided does not allege any complaints against the named Defendants herein.¹

¹ Vargas's Complaint names as Defendants "C.O. Powell, C.O. Bigelow, Sgt. Ewing and John Doe Kitchen Personnel." Vargas' Motion to Proceed *In Forma Pauperis* names "Hoffman, et al." as Defendants. Vargas' Complaint specifically identifies C.O. Powell, C.O. Bigelow, Sgt. Ewing and John Doe kitchen personnel as the parties Vargas "would like to open a lawsuit against." No other parties are identified as Defendants or potential Defendants in the Complaint. Vargas' attached grievance is directed to the actions of "P.A. Hoffman and Dr. Long". C.O. Powell, C.O. Bigelow, Sgt. Ewing and the John Doe kitchen personnel are not identified in the grievance, either specifically or as John Doe's.

WHEREFORE, answering Defendants pray your Honorable Court to dismiss Vargas' Complaint for failure to exhaust administrative remedies as required by 42 U.S.C. §1997(e)(a).

FAILURE TO STATE A CLAIM UPON WHICH
RELIEF MAY BE GRANTED

8. Vargas has failed to allege any facts which would support a claim that he has been subjected to cruel and unusual punishments, as that term has been defined by the Court.
9. Vargas has failed to allege any facts which would support any claim for any violation of his rights by Corrections Officer Powell, Corrections Officer Bigelow or Sergeant Ewing.

WHEREFORE, answering Defendants pray your Honorable Court to dismiss Vargas' Complaint for failure to state a claim upon which relief may be granted.

Respectfully submitted,
PA Department of Corrections,

By:


Michael J. McGovern
Assistant Counsel
Attorney I.D. No. 52802
Office of Chief Counsel
55 Utley Drive
Camp Hill, PA 17011
717-731-0444

Dated: 09/07/01

CERTIFICATE OF SERVICE

I hereby certify that I have on this date served a copy of the below-referenced document(s) upon the person(s) and in the manner indicated below:

Service by first class mail, postage prepaid, addressed as follows:

Gregorio A. Vargas, CS-4471
SCI-Somerset
1590 Walters Mill Road
Somerset, PA 15510-0001

Corinne N. Driver

Corinne N. Driver
Clerk Typist II
PA Department of Corrections
Office of Chief Counsel
55 Utley Drive
Camp Hill, PA 17011
(717) 731-0444
Fax: (717) 975-2217

Dated: 9/7/01

Re: Motion to Dismiss
Vargas v. C.O. Powell, et al.,
USDC-MD 1:CV-01-0296